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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW et al

v.

BOSTON REDEVELOPMENT AUTHORITY et al

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions, Statutes and Rules	3
Statement	4
Reasons For Granting the Writ	8
Conclusion	12
Appendix A — Opinions and Judgment Below	13
Dissenting Opinion	31
B — Statutes	36
C — Informal Request for Rehearing and Denial Thereof	40
D — "Conclusion" of Briefs Filed Herein With Supreme Judicial Court	44
E — "Conclusion" of Plaintiff's Briefs in Two Cited Cases	46

Citations

Cases

Berman v. *Parker*, 348 U.S. 26	11
County of Dukes County v. *Nantucket etc. S.S. Co.*, 333 Mass. 405	10
Foley v. *Springfield*, 328 Mass. 59	9
Grannis v. *Ordean*, 234 U.S. 385	8
Hovey v. *Elliott*, 167 U.S. 409	9, 12
Moskow v. *Boston Redevelopment Authority*, Mass. Adv. Sh. (1965) 1203	2, 5n, 6
Powers v. *Sturtevant*, 200 Mass. 519	7
Reynolds v. *Stockton*, 140 U.S. 254	12
Saunders v. *Shaw*, 244 U.S. 317	7, 12

Page

School Comm. of New Bedford v. *Comm. of Educ.*, Mass. Adv. Sh. (1965) 1029 10
Trustees of Reservations v. *Stockbridge*, Mass. Adv. Sh. (1965) 265 ..... 10, 11
Vasilakis v. *Haverhill*, 329 Mass. 97 9
Willcutt v. *Prescott*, 340 Mass. 532 ..... 10, 11

Constitution and Statutes

U.S. Const., Amendment XIV, s. 1 ..... 3, 6, 7, 8, 9, 12
28 U.S.C. s. 1257(3) 2
Mass. G.L. c. 231, ss. 59, 59B 8
Mass. G.L. c. 231A 3, 4

Rules of Court

Supreme Judicial Court Rule 15(A)(5) 4, 5, 9
Superior Court Rule 28 ..... 2, 3, 5

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the above-entitled case on August 17, 1965.*

---

*The petitioners are Abraham Moskow, Jay I. Moskow, Harry Moskow and Myer Moskow. Respondents are Boston Redevelopment Authority; Christopher Iannella, George F. Foley, William J. Foley, Frederick C. Langone, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines, and Katherine Craven, as they are members and constitute the City Council of Boston; The Division of Urban and Industrial Renewal, John J. Carney, as he is the Temporary Director of the Division of Urban and Industrial Renewal; the City of Boston; New England Merchants Bank of Boston, and Andrew A. Hunter.

Citations to Opinions Below

No opinion was rendered by the Superior Court of Massachusetts in this case. The majority opinion of the Supreme Judicial Court of Massachusetts, written by Wilkins, C.J., and the minority opinion written by Kirk, J., are printed in Appendix A hereto, infra pp. 13, 31, and are reported in Mass. Adv. Sh. (1965) 1203, 1220.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on August 17, 1965. Record, page following printed record. There is no formal provision for rehearing in that court. Informal application for rehearing was made on August 30, 1965, by letter addressed to Chief Justice Wilkins (infra, Appendix C, p. 40) and was denied on October 4, 1965 (infra, Appendix C, p. 43).

The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3) since said judgment of the Supreme Judicial Court was entered without the notice and opportunity to be heard to which petitioners are entitled by the due process clause of the Fourteenth Amendment to the United States Constitution, and deprives them of property in violation of said clause.

Question Presented

It is settled Massachusetts law that a demurrer to a bill for declaratory relief must be overruled if the bill states a justiciable controversy; it is immaterial on demurrer that the declaration, when ultimately entered, may be against the plaintiff's contention. Rule 28 of the Superior Court provides that a respondent may, by leave of court, demur without answering, in which case he must file an

answer within ten days after the demurrer is overruled. Here the bill asked for a declaratory judgment that a taking of plaintiffs' land was invalid. Respondents, by leave of court, demurred without answering, on the ground that the bill stated no justiciable controversy. The Superior Court sustained the demurrers and dismissed the bill. Plaintiffs appealed to the Supreme Judicial Court. The question presented is

> May the Supreme Judicial Court, after reversing the Superior Court and overruling the demurrers, simultaneously and without further notice or hearing enter a judgment declaring the taking valid, without violating the due process clause of the Fourteenth Amendment to the United States Constitution?

Constitutional Provision Statute and Rules Involved

The United States Constitution, Amendment XIV, s. 1 provides ". . . nor shall any State deprive any person of . . . property, without due process of law; . . . ."

The Massachusetts declaratory judgment statute is found in Mass. G. L. c. 231A, and is printed in Appendix B, infra, pp. 36-38. Rule 28 of the Superior Court of Massachusetts relating to demurrers, pleas and answers in equity, provides in material part as follows:

> "The court may give leave ex parte to a defendant to file a demurrer or plea, reserving his answer. In the absence of such leave, the defendant must (a) file at the same time his demurrer, plea and answer, or such of them as he may desire ,and shall have no right without leave of court to file another of such pleadings after filing any one of them, or (b) include in

his answer any special matter by way of demurrer and plea, or either of them, describing such matter clearly as by way of demurrer or plea as the case may be, in which case and not otherwise he shall have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

"If a plea or demurrer shall be filed, with leave to reserve the answer, and the plea or demurrer shall be overruled or disproved, no other plea or demurrer shall be received without leave of court, but the defendant shall within ten days answer the bill."

Rule 15 of the Supreme Judicial Court Rules for the Regulation of Practice before the Full Court, provides in part as follows:

"(A) A brief shall contain in the order here indicated

. . . . . .

(5) A conclusion specifying with particularity the relief to which the party claims to be entitled."

Statement

In this proceeding, commenced by bill in equity in the Superior Court of Massachusetts, (PR 1-11), pursuant to Mass. G.L. c. 231A (Appendix B, infra, pp. 36-38) the petitioners (hereinafter called the Moskows) sought a declaration that the taking of their land and building at 10 State Street, Boston, by the defendant Boston Redevelopment Authority was void (PR 10). The basic allegation is that the taking was not for a public purpose, but was for the purpose of providing new quarters for the defendant New

England Merchants National Bank of Boston, pursuant to a scheme agreed upon by the Bank, the Revelopment Authority, and Cabot, Cabot and Forbes, a private developer selected by the Bank to construct a new building at 10 State Street. (Bill, par. 6; PR 2-4) Further allegations of the bill attacked the action of the defendant City Council of Boston (Bill, par. 8-19; PR 5-8) and of the Division of Urban Renewal (Bill, par. 20-21; PR 9) in approving the inclusion of plaintiffs' land in the redevelopment plan, and the activities of the defendant Hunter, a director of the Bank, who was alleged to have raised a campaign fund for certain members of the council on the basis that they would, if elected, vote for the redevelopment plan.* (Bill, par. 10, 11, 14, 18; PR 6-8).

Each of the defendants demurred to the bill. (Printed Record 11-12, 14, 16-17, 18-19, 21). No answers were filed. Defendants Boston Redevelopment Authority, City of Boston, City Council of Boston, New England Merchants National Bank and Hunter obtained leave under Rule 28 of the Superior Court to demur without answering, which gave them the right to answer within ten days after the demurrers were overruled. Docket, Items 3, 4, 6, 8.

The Superior Court, after hearing, entered interlocutory decrees sustaining the demurrers (PR 13, 14, 17, 20, 21), and a final decree dismissing the bill. (PR 23). Plaintiffs duly appealed to the Supreme Judicial Court from these decrees. (PR 13, 15, 18, 20, 22, 23).

All parties duly filed briefs in the Supreme Judicial Court. Each such brief complied with Rule 15 (A) (5) governing practice before the full court, in that it contained

*This case was heard with four others, which were proceedings attempting to obtain judicial review of, or otherwise attacking, various steps taken in adopting the redevelopment plan. These four cases were finally disposed of in the opinion of the Supreme Judicial Court here in question. Mass. Adv. Sh. (1965) 1203, 1218-1220; App. A, pp. 29-31. Petitioners claim no error with respect to those judgments.

a "conclusion" stating with particularity the relief requested. Those "conclusions" are set forth in Appendix D, hereto, pp. 44-46). Petitioners, who were appellants, asked the Supreme Judicial Court to reverse the decrees appealed from and remand the case for further proceedings. App. D, p. 44. Each respondent asked that the decrees be affirmed. App. D, pp. 44-46. No one asked that a declaratory judgment be entered.

The Supreme Judicial Court handed down its opinion on August 17, 1965, with Kirk and Spiegel, JJ., dissenting. Those opinions are printed in Appendix A, pp. 13, 31, infra. The Court held that the demurrers of defendants New England Merchants National Bank and Andrew A. Hunter were properly sustained, on the ground that the bill stated no controversy as to them. App. A, p. 29. The court disposed of the remainder of the case as follows:

> ". . . On the demurrers of the other defendants it would have been better practice to overrule the demurrers and enter a negative declaration. See *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhlil,* 339 Mass. 97, 101; *School Comm. of New Bedford* v. *Commissioner of Educ.* . . . (Mass. Adv. Sh. (1965) 1029, 1030-1031.)
>
> "7. Let the entries be made: . . . As to the other defendants the interlocutory and final decrees are reversed and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity." (Mass. Adv. Sh. (1965) 1203, 1218; App. A, p. 29)

In paragraph 7 of the bill (PR 5) the petitioners claimed, under the Fourteenth Amendment to the Constitution of the United States, a full and fair hearing on the question whether the taking of their land was for a public purpose.

There is no provision for rehearing by the Supreme Judicial Court. By custom one may informally call an error to the attention of the Court. *Powers* v. *Sturtevant*, 200 Mass. 519, 520-521. Counsel for petitioner so acted in this case by writing to Chief Justice Wilkins on August 30, 1965, and sending copies to counsel for the other parties. See Appendix C, hereto. pp. 40-42. That letter, after requesting a rehearing as to the binding declaration contained in the opinion (App. C, p. 40), concluded as follows (App. C, pp. 41-42):

> "In order to protect the rights of plaintiffs I am bound to state further to the Court that the entry of a binding declaration on the present record deprives the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that they have never had the opportunity to establish the relevant facts by introducing evidence, nor the opportunity to be heard as to the proper declaration to be entered after the facts are established. Upon this point I respectfully refer the Court to the opinion of Mr. Justice Holmes in *Saunders* v. *Shaw*, 244 U.S. 317, 320:
>
> > ". . . But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights

given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U.S. 278 . . ."

The petitioners' request for rehearing was denied by the Court by letter of October 4, 1965 (App. C, p. 43). Neither letter is a part of the record of the Court.

Reasons for Granting the Writ

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385, 394. Petitioners were denied this opportunity with respect to the binding declaration entered against them by the Supreme Judicial Court. That declaration was a summary judgment entered with no lawful basis, for Massachusetts has but a limited summary judgment statute clearly not applicable here. Cf. Mass. G. L. c. 231, ss. 59, 59B.

The decisive question is this: When counsel for petitioners briefed and argued this case on appeal, had he any notice that one question before the court was the entry of a final declaration?

Consider the matter first from the viewpoint of counsel for respondents Boston Redevelopment Authority (which took the land in question), City of Boston, Boston City Council, New England Merchants National Bank and Hunter. It was clear beyond dispute when these respondents briefed and argued that the Supreme Judicial Court could enter no binding declaration *against them,* for they had by express leave of court the right to answer and traverse the facts in the bill should the demurrer be overruled. Docket Items 3, 4, 6, 8. If the Supreme Judicial Court had overruled the demurrers and entered a declaration that the taking was valid, that declaration would

have deprived these respondents of their right to answer, in violation of the due process clause. *Hovey* v. *Elliott*, 167 U.S. 409. Clearly, then, the hearing on demurrer did not call upon the respondents to brief and argue the question *what* declaration should be entered. Nor did they do so. The "conclusion" of each respondent's brief, which by Rule 15 (A)(5) of the Supreme Judicial Court is required to set forth with particularity the relief requested, asks merely that the decrees sustaining the demurrers be affirmed. No respondent asked that a declaration be entered. App. D, infra, pp. 44-46.

Nor did counsel for petitioners ask that a declaration be entered; he asked simply that the decrees sustaining the demurrers be reversed and the case be remanded for further proceedings. App. D, p. 44. Was he called upon, at a hearing on demurrer, to argue the question *what* declaration should enter, to argue a question upon which the Fourteenth Amendment forbade a decision in his favor?

Nothing in the previous decisions of the Supreme Judicial Court put the petitioners on notice that a binding declaration might be entered against them. The decisions cited by the Supreme Judicial Court in its opinion support the position we now urge. In two of those cases, in which the Supreme Judicial Court on appeal held that demurrers should be overruled and a declaratory judgment entered, the facts had been established either by agreement (*Foley* v. *Springfield*, 328 Mass. 59, 62-63) or by trial in the Superior Court. *Vasilakis* v. *Haverhill*, 339 Mass. 97, 101. In the third case, which in its procedural aspects exactly resembles the case at bar, the Supreme Judicial Court, after holding that the demurrer should have been overruled, went on as follows:

> "It may be that the bill states with substantial accuracy the relevant facts. That however, cannot be

> determined in advance of the filing of the defendants' answers and trial on the merits. Thus we do not afford declaratory relief finally on this record . . ." *School Committee of New Bedford* v. *Commissioner of Education,* Mass. Adv. Sh. (1965) 1029, 1031.

The Supreme Judicial Court has repeatedly stated that the following rule is applicable on demurrer to a bill for declaratory relief:

> ". . . Ordinarily a demurrer cannot properly be sustained to a bill for a declaratory decree on the ground that the court does not agree with the proposition for which the plaintiff contends. Usually a declaratory decree should be made in any event." *County of Dukes County* v. *New Bedford etc. S.S. Authority,* 333 Mass. 405, 406.

We observe, however that no decision says or holds that the declaratory decree should be entered *summarily* upon the overruling of the demurrer, prior to any determination of fact binding on both parties. The true meaning of the rule is that a demurrer raises only the question *whether any,* not the question *what,* declaration should be entered. The question *"what"* is *immaterial* on demurrer; it is left for later disposition, both as to questions of law and questions of fact, if the demurrer be overruled. And if the demurrer be sustained there is clearly, under Massachusetts practice, no judgment on the merits.

Respondents may cite *Willcutt* v. *Prescott,* 340 Mass. 532, and *Trustees of Reservations* v. *Stockbridge,* Mass. Adv. Sh. (1965) 265, in each of which cases the Supreme Judicial Court on appeal ordered demurrers overruled and declarations entered against the plaintiffs. The court in each

case categorically stated, what it could not and did not state in the opinion in this case, that "There are no facts in dispute . . ." 340 Mass. 532, 535; Mass. Adv. Sh. (1965) 265, 267. It is significant, we think, that the plaintiff in each case, in the "conclusion" to his brief, asks that the court enter a declaratory judgment. (App. E, infra, p. 47) Volenti non fit injuria. A constitutional right may be waived.

Nothing in the present posture of this case involves in any way what was decided by this Court in *Berman* v. *Parker,* 348 U.S. 26. Yet as that case has been and may again be cited by respondents, a comparison between the *procedure* followed in *Berman* and that followed here is useful. In *Berman* the plaintiffs filed a petition somewhat like the bill in this case. The respondent, before filing an answer, moved to dismiss, or, in the alternative, for summary judgment, the motion being supported by affidavits. Berman Tr. 8-44. The plaintiff then filed a cross-motion for summary judgment in which he stated that there was no dispute as to any material fact. Berman Tr. 45. Thus the facts were established upon which the three-judge district court, and this Court upon appeal, might properly enter a declaratory judgment. And the parties were bound to know, in arguing the case before each court, that the question presented was "what declaration shall be made?" The *Berman case* thus differs in a vital respect from the case at bar.

As we have seen above the parties to this case were bound only to consider the question *whether* declaratory relief could be given. They were fully entitled to treat the question "*what* relief?" as immaterial to the appeal. They *did* treat it as immaterial. The declaratory judgment in this case was entered without notice and opportunity

to be heard in violation of the due process clause of the Fourteenth Amendment.

Saunders v. *Shaw,* 244 U. S. 317.
Reynolds v. *Stockton,* 140 U. S. 254, 265-266.
Hovey v. *Elliott,* 167 U. S. 409, 414, 445-446.

The petitioners were completely taken by surprise by the decision of August 17, 1965, and have claimed their federal question at the first possible opportunity, by informal request for rehearing by the Supreme Judicial Court on August 30, 1965, and by asserting it in this petition. *Saunders* v. *Shaw,* 244 U. S. 317, 320.

This case raises an important and undecided constitutional question in the heavily litigated field of declaratory judgments. The dissenting opinion of the Supreme Judicial Court (App. A, pp. 31-35) indicates, we think, that petitioners have a substantial case to urge upon the Massachusetts courts when they are given the opportunity to be heard.

Conclusion

For the foregoing reasons we ask that the court grant this petition for a writ of certiorari.

Respectfully submitted,

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Of Counsel:
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EDGAR L. KELLEY

Appendix A

OPINION OF THE SUPREME JUDICIAL COURT

S-6624
S-13,348
S-13,349
S-6622
S-6623

ABRAHAM MOSKOW & Others[1]

vs.

BOSTON REDEVELOPMENT AUTHORITY & Others
(and four companion cases).[2]

WILKINS, C. J. THE PRINCIPAL BILL FOR DECLARATORY RELIEF.

The plaintiffs own as tenants in common a parcel of land with an office building at 10 State Street, Boston, title to which they acquired on July 23, 1964, from State Street Corporation (State Street), a corporation of Massachusetts, of which they were the sole stockholders, and which on that date they voted to liquidate and dissolve. Also on that date, shortly after the deed to the plaintiffs was recorded, the defendant Boston Redevelopment Authority, a body corporate and politic established under G. L. c. 121, § 26QQ (as amended by St. 1957, c. 150, § 1) and given powers and duties unique for a redevelopment authority by St. 1960, c. 652, §§ 12-14, voted to take the property. The plaintiffs contend the taking to be invalid and bring

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[1] Jay I. Moskow, Harry Moskow, and Myer Moskow.

[2] The companion cases are all by State Street Corporation: No. 13,348, certiorari against City Council of Boston; No. 13,349, certiorari against John J. Carney, temporary Director of Division of Urban and Industrial Renewal, and Boston Redevelopment Authority; No. 6622, bill in equity against City Council of Boston, Boston Redevelopment Authority, New England Merchants National Bank of Boston, and Andrew A. Hunter; and No. 6623, petition for review under G. L. c. 30A, § 14, against the Division of Urban and Industrial Renewal.

this bill in equity pursuant to G. L. c. 231A for a declaratory decree and for injunctive relief.[3] The controversy alleged is between the plaintiffs and the Authority. The defendants city of Boston, the city council, the Division of Urban and Industrial Renewal,[4] and John J. Carney, its "temporary" director, are made defendants allegedly because of G. L. c. 231A, § 8. Also made defendants are New England Merchants National Bank of Boston, having a usual place of business at 28 State Street, and Andrew A. Hunter "because of their interest in the proceedings." All the defendants filed demurrers. These were five in number: (1) by the Authority; (2) by the city and the city council; (3) by the Division and Carney; (4) by the bank; (5) by Hunter.

The plaintiffs appealed from interlocutory decrees sustaining the demurrers and from a final decree dismissing the bill.

We summarize the factual allegations of the bill. The primary purpose of the taking was not the public interest but was to provide a site for a new private office building to be occupied by the bank. The taking was made ostensibly in connection with a redevelopment project of the Authority, known as the Government Center Project (the Project), under the powers conferred by G. L. c. 121. Neither the property at 28 State Street nor that at 10 State Street was within a decadent, substandard, or blighted open area within the meaning of c. 121, and the Authority had no power to take those properties on the ground that they were

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[3] Case No. 6624.

[4] As of August 6, 1964, the name of the Division was changed to the Division of Urban Renewal, and the Division was placed in the Department of Commerce and Development of the Commonwealth. G. L. c. 121, § 26J, as amended by St. 1964, c. 636, § 6. Previously the name of the Division was the Division of Urban and Industrial Renewal, and the Division was located in the Department of Public Welfare. See St. 1960, c. 776, §§ 1, 2.

within such areas. The Authority, however, proposed to widen and reconstruct Congress Street on which the bank's building bounded, so as to facilitate access to the Project and to take the bank's property for that purpose. The bank, which had had its principal office on State Street for many years, vigorously protested this proposal on various grounds, among them, that its property was not within a decadent, substandard, or blighted area, and that it was not necessary to take its property to widen Congress Street. After negotiations among representatives of the bank, of the Authority, and of Cabot, Cabot & Forbes Company (Cabot), a developer selected by the bank, an understanding was reached that the bank would withdraw its objections and would endeavor to purchase the property at 10 State Street from State Street; that if the bank should be able to make the purchase, it would cause the existing building at 10 State Street to be demolished and the land to be conveyed to Cabot, which would erect upon the site a new tower building of a design and specifications approved by the bank and the Authority, and would lease the first ten floors to the bank; that in that case the bank would sell its property at 28 State Street to the Authority at the fair value, retaining the right to possession until the new building should be completed and ready for occupancy; that if the bank should be unable to purchase the property at 10 State Street upon acceptable terms, the Authority would include both that and the bank's property in the area which it proposed to take for the Project, and would dispose of it to Cabot upon terms satisfactory to Cabot; that Cabot would then proceed to construct the new tower building to be occupied by the bank; but that until the new building should be ready for occupancy, the bank and its tenants might continue to occupy the premises at 28 State Street. The purpose of the understanding was to "coerce" State Street to sell its property to the bank so that the

latter might continue to maintain its principal offices on State Street. To effect that purpose, the administrator of the Authority "threatened" the officers of State Street that unless it sold to the bank, he would cause it to be included in the urban renewal plan for the Project, and to be taken by the Authority by eminent domain.

State Street was unwilling to sell to the bank at the price which the bank offered. Accordingly, the administrator of the Authority, pursuant to the understanding set forth above, caused an Urban Renewal Plan to be prepared which included both the property of the bank and that of State Street. These properties were designated on the Plan as Parcel 8, and the specifications of land uses required that a tower building conforming generally to the specifications previously approved by the bank, the Authority, and Cabot be erected thereon. On April 2, 1963, the Authority gave notice of a hearing upon the proposed plan to be held on April 17, 1963. On June 5, 1963, the Authority voted to approve the Plan.

The Authority first submitted the Plan to the city council for approval in June, 1963. On July 22, 1963, after a public hearing at which State Street appeared by counsel, the Committee on Urban Redevelopment, Rehabilitation, and Renewal of the city council reported that a majority of the committee were in favor of the Project with the boundaries which had been earlier defined, but were opposed to the inclusion of Parcel 8. Thereupon the council rejected the Plan by a vote of five to four. On July 29, 1963, the council again voted to reject the Plan.

During August, September, and October, 1963, the mayor and others, including a director of the bank, attempted to make the approval of the Plan a political issue in the November election of members of the city council. The director headed a group which recommended a slate pledged to vote for approval of the Plan including Parcel 8 and

solicited campaign contributions to promote their election. George F. Foley and Barry Hynes were on that slate. Frederick C. Langone publicly pledged his support before the election. None of the three had heard the evidence introduced in the hearings before the council. On or about November 18, 1963, after the election the defendant Hunter sent George F. Foley and Barry Hynes each a check for $29 as his share of the unexpended surplus of contributions received as their agent.

On April 13, 1964, the mayor resubmitted the Plan to the city council. On May 7, 8, 12, and 13, 1964, the council held hearings on the Plan at which the plaintiff's counsel appeared and proposed objections to the approval of the Plan including Parcel 8. The plaintiffs' counsel suggested that Foley, Hynes, and Langone be disqualified on the ground that they had publicly pledged themselves during the campaign, and Foley and Hynes on the additional ground that they had received compensation for their pledges. During the hearing the plaintiffs' counsel requested Langone to disqualify himself on the additional ground that a member of his immediate family had a financial interest in the Project in that such member was conducting a funeral home in the area, paying rent, and seeking to relocate in the area. All three declined to disqualify themselves and were in the majority on May 25, 1964, when the council approved the Plan by a vote of five to four.

At the hearing the plaintiffs' counsel requested permission to cross-examine witnesses and to call other witnesses on the ground that the proceedings were quasi judicial and that due process required this as a matter of right. The council refused such permission, ruling that the proceedings were legislative and not quasi judicial. At the hearing the plaintiffs also objected to the council reconsidering the Plan including Parcel 8 on the ground that it had been twice submitted and rejected in 1963 with finality, that it

was again submitted without modification or other action by the Authority, and that the determinations of fact made by the council in 1963 were res judicata and not to be set aside by members of the council thereafter elected. On May 25, 1964, the council by a vote of five to four approved the Plan including Parcel 8.

On May 26, 1964, the Authority submitted the Plan to the Division of Urban and Industrial Renewal for approval. On June 12, 1964, at the request of more than twenty-five taxable inhabitants of Boston, the Division held a public hearing at which State Street appeared by counsel. Although the proceeding was one in which State Street was directly involved and there were issues of fact upon which State Street had a constitutional right to be heard, the Division by its temporary director, Carney, denied State Street a fair hearing and refused to permit it to intervene, or to call and examine or to cross-examine witnesses, and to issue subpoenas in the name of the Division, all on the ground that the hearing was legislative and not adjudicatory or quasi judicial.

The plaintiffs' bill further alleges that the Plan submitted by the Authority was invalid and should not have been approved because it did not conform to a general plan for the municipality as a whole and was not sufficiently complete to indicate zoning and planning changes as required by G. L. c. 121, § 26ZZ. There is no general plan for Boston as a whole. The specifications in the Plan for the use of Parcel 8 violate the "zoning ordinances" of Boston, but the Plan does not indicate the changes in the "ordinances" required.

1. At the outset we shall eliminate two defendants whose presence in the discussion is unnecessary. Their demurrers were rightly sustained.

(a) The first is the bank. It will be recalled that it is alleged that the controversy is between the plain-

tiffs and the Authority. The bank may be more than an interested bystander, but it does not have the kind of interest referred to in G. L. c. 231A, § 8 (inserted by St. 1945, c. 582, § 1). In other words, it does not "have or claim any interest which would be affected by the declaration." No contractual right is alleged, and, as to the controversy, the bank is in no different legal position from that of any other prospective tenant.

(b) The second is Hunter, who has no interest whatsoever to be affected by the declaration. His only connection is extremely indirect through two members of the city council, who, as later appears, were not disqualified from voting. His claim for counsel fees we leave to application to the court below, should he be so advised.

2. We next consider certain issues raised by allegations of the bill which have been the subject of decisions of this court. No attention can be paid to the allegations that the property at 10 and 28 State Street is not within a decadent, substandard, or blighted open area and that the Authority had no power to take on such grounds. Courts are not authorized to second guess the Authority in such respects. The allegations, moreover, do not mean that the public bodies designated by statute might not reasonably adjudge otherwise. *Stockus* v. *Boston Housing Authy.*, 304 Mass. 507, 509-510. *Bowker* v. *Worcester,* 334 Mass. 422, 434. *Worcester Knitting Realty Co.* v. *Worcester Housing Authy.*, 335 Mass. 19, 22. See *St. Luke's Hosp.* v. *Labor Relations Commn.*, 320 Mass. 467, 470. *Electronics Corp. of America* v. *City Council of Cambridge,* Mass. .[5]

Nothing is added to the plaintiffs' case by such words of belligerence as "coerce" and "threatened." *Fleming* v.

[5] Mass. Adv. Sh. (1965) 323, 327.

Dane, 298 Mass. 216, 218. *DeVincent Ford Sales, Inc.* v. *First Mass. Corp.,* 336 Mass. 448, 452. Restatement: Torts, § 783, comment a. See dissent of Holmes, J., in *Vegelahn* v. *Guntner,* 167 Mass. 92, 107.

The bill contains an allegation that the Authority originally intended to take the bank property at 28 State Street to widen and reconstruct Congress Street so as to facilitate access to the Project area, but does not allege that there was a similar intention as to the plaintiffs' property at 10 State Street. If the latter property had been included in Parcel 8, it is not denied that it could have been properly so taken, and that the determination of the boundaries of the area was a matter exclusively for the Authority and not subject to judicial review. *Worcester Knitting Realty Co.* v. *Worcester Housing Authy., supra,* 22.

The plaintiffs' case is epitomized in the allegations: "The primary purpose of the taking of the plaintiffs' land was not the public interest, but was to provide a site for a new private office building to be occupied by the defendant bank. The taking was made ostensibly in connection with a redevelopment project of the Authority, now known as the Government Center Project. . . ." This charge must be read with the remainder of the bill in order to determine whether there are sufficient allegations of specific facts to be good on demurrer. These characterizations may be construed as a backhanded way of generalizing that the principal purpose was not public, but such rhetoric is not an adequate substitution for allegations, with adequate specification of facts, that the Project with 10 State Street included in Parcel 8 was not for a public purpose. A most significant omission is any allegation that the members of the Authority were to the least extent involved in any negotiations with the bank or had authorized them or even knew about them. Everything is charged against the administrator. To the extent disclosed by the bill, the vote

of the Authority adopting the Project was proper and entirely legal.

The case does not fall within the illustration in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, 263, which reads: "It is perhaps possible to imagine a case where the authorities ostensibly taking land for a schoolhouse have no intention of building any schoolhouse at all but are really taking the land to let it lie open for the benefit of adjoining land owned by themselves or for some other irrelevant purpose." The Authority here has voted to take the property for the Government Center Project, and intends to continue to carry out that project. The sole reason apparent for delay is the pendency of litigation. Nothing in *Village on the Hill, Inc.* v *Massachusetts Turnpike Authy.*, Mass. ,[6] in the least degree relaxes the strictures imposed in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, against "attacking merely the impelling motives of officers authorized to exercise the power of eminent domain and actually exercising that power for authorized purposes" (page 264). The *Village on the Hill* case was tried on the merits.

In order to make a case against the Authority from the allegations of the bill it would be necessary to assume that the administrator was authorized to do and say everything alleged and to assess the Authority with full accountability for the acts and statements attributed to the administrator because he was its chief administrative officer. See *Simonian* v. *Boston Redevelopment Authy.*, 342 Mass. 573, 578n-579.

"No intendment in favor of the pleader can be made upon a demurrer. It admits allegations of fact well pleaded but does not admit inferences from such facts unless they are necessary inferences. It does not admit conclusions of law from facts averred. *Comerford* v. *Meier*, 302 Mass. 398,

[6] Mass. Adv. Sh. (1964) 1245.

402, and cases cited." *Walter* v. *McCarvel,* 309 Mass. 260, 263-264. These are well established principles of very long standing and have been frequently declared. *Dealtry* v. *Selectmen of Watertown,* 279 Mass. 22, 27. *Stockus* v. *Boston Housing Authy.,* 304 Mass. 507, 510-512. *Foster* v. *Shubert Holding Co.,* 316 Mass. 470, 474. *Matek* v. *Matek,* 318 Mass. 677, 679. *Cabot* v. *Assessors of Boston,* 335 Mass. 53, 58. *James Constr. Co. Inc.* v. *Commissioner of Pub. Health,* 336 Mass. 143, 146. *Joyce* v. *Hickey,* 337 Mass. 118, 123. *J. J. Gordon, Inc.* v. *Worcester Telegram Publishing Co. Inc.,* 343 Mass. 142, 143. *Weinstein* v. *Chief of Police of Fall River,* 344 Mass. 314, 317. *Harrington* v. *Worcester,* 345 Mass. 166, 167-168.

There is set forth no adequate specification of facts to substantiate other generalities of the bill. None is found in the bank's protest against the taking of its property. The negotiations said to have taken place among representatives of the bank, of the Authority, and of Cabot do not identify the representatives of anyone, and of the Authority in particular. We cannot supply an allegation that any representatives were authorized to bind the Authority to such an "understanding" which the plaintiffs insist was improper. We do not construe these allegations as meaning that any member of the Authority was such a representative. We infer that none was. Even if one or more members of the Authority had been present, it could not avail the plaintiffs. The members comprise a board of public officers, who must make official decisions, such as are involved in a taking of land, by at least a majority vote given at a duly constituted meeting of the board. They could not act separately or individually. *Alphen* v. *Shadman,* 330 Mass. 608, 609.

Wrung dry of broad generalities, all that is left of the bill of complaint on the point presently considered is a discussion by "representatives" of three parties followed

by an "understanding" which led to the inclusion of 10 State Street in the Project area.

On this point this is the opinion of a majority of the court.

3. We next pass to numerous miscellaneous objections of the plaintiffs to the approval of the Plan (a) by the city council and (b) by the Division.

"Urban renewal projects shall be planned, undertaken and carried out in a city or town by the redevelopment authority thereof. . . ." G. L. c. 121, § 26YY (inserted by St. 1955, c. 654, § 4). "No urban renewal project shall be undertaken until the urban renewal plan therefor has been submitted to, and approved by, the division of urban and industrial renewal; and no urban renewal plan shall be submitted to the division of urban and industrial renewal unless the same has been approved . . . by the mayor with the approval of the city council . . . after due notice and a public hearing." G. L. c. 121, § 26ZZ (as amended through St. 1960, c. 776, § 7).

The statute does not indicate that the function of the city council was meant to be in any sense like that of a court, but rather makes the requirement that the mayor and the council, who are elected, give their sanction to a project initiated by the Authority, all of whose members were appointed.[7] There is nothing in § 26ZZ to show that the Legislature intended a council hearing to resemble one in court with absolute rights of examination and cross-examination. Statements at such a hearing were not evidence. See, generally, Sullivan, Administrative Procedure and the Advocatory Process in Urban Redevelopment, 45 Cal. L. Rev. 134, 143-144. The earlier votes of the council were not res judicata, and could not prevent action by

[7] G. L. c. 121, § 26QQ (as amended through St. 1957, c. 150, § 1); § 26L (as amended through St. 1961, c. 496, § 1). St. 1964, c. 636, § 10.

another council later elected. One might as well contend that a Legislature lacked power to vote to take some action which had been voted down by a previous Legislature.

No member of the city council was disqualified because he had expressed an opinion or taken sides on the merits of the Plan including Parcel 8 whether during an election campaign or at any other time. This rule applies equally to those voting in favor as well as to those opposed. The issue was wholly political in character. *Hayeck* v. *Metropolitan Dist. Commn.*, 335 Mass. 372, 375, and cases cited. It was likewise one of great interest in the community, and the voters were entitled to know the views of the candidates, who had a right, and perhaps a duty, to state their positions. Should the plaintiffs' contention as to disqualification be accepted, a not unlikely result would be that all the members of the council would be affected. What we consider the correct view was well expressed in *Wollen* v. *Borough of Fort Lee,* 27 N. J. 408, where the votes of three councilmen on the approval of a zoning plan were challenged because they publicly announced, when candidates for election, how they would vote. At p. 421 it was said: "[T]his is the democratic process; and it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn legislative duties. Such is not the bias or prejudice upon which the law looks askance. There is no showing that the minds of these councilmen were not open to conviction in the just fulfillment of what they severally conceived to be a solemn obligation to the community. Otherwise, representative democracy would be subverted, and local self-government denied." If the decision of a lower court in *Saks & Co.* v. *Beverly Hills,* 107 Cal. App. 2d 260, is to the contrary we deem it unconvincing and decline to adopt it.

Equally ineffective as a ground of bias against two council members is the charge that they were beneficiaries of campaign fund contributions related to this issue, and that after the election each received from the defendant Hunter a payment of $29 as his share in the unexpended balance of the fund. Contrary to the allegation in the bill, this was not "compensation for their pledges." In their brief the plaintiffs make broad references to this being within the prohibition of G. L. c. 268A, §§ 3 and 17 (as appearing in St. 1962, c. 779, § 1). In the absence of an express statement in the statute we shall not construe campaign contributions as falling within these sections. They carry heavy panalties by fine and imprisonment and are derived from legislation proposed by the Special Commission on Code of Ethics, § 3 (e)-(i) and §§ 24-27. See 1962 House Doc. No. 3650, pp. 26-27, 38-39. In specifying the scope of the proposed legislation, the commission stated that it made the decision "not to include in the criminal section related subject matters such as . . . campaign contributions . . ." (p. 9).

A further charge of bias against a third member of the city council, Frederick C. Langone, arises from the allegation that "a member of his immediate family had a financial interest in the Government Center Area Project, in that such member of the family was conducting a funeral home in premises located in the Area, paying rent therefor, and seeking to relocate his business within the Area." This is based upon G. L. c. 268A, § 19 (a) (as appearing in St. 1962, c. 779, § 1).[8]

[8] "Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge . . . his immediate family . . . has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both."

The definition of "immediate family" is given in c. 268A, § 1, as "the employee and his spouse, and their parents, children, brothers and sisters."

The present funeral home site is in the original project area, and not on State Street, as the plaintiffs concede in their brief. The statute is deficient in not containing a definition of "financial interest." 76 Harv. L. Rev. 1209, 1226-1227. The bill is not sufficiently definite to charge Langone with the commission of a criminal offense carrying severe penalties. It does not appear in the allegations that the Plan contains any reference to the funeral home. While the unnamed member of Langone's family may have a financial interest in subsequent decisions of the Authority, nothing discloses that such member had any financial interest in the approval of the Plan with or without Parcel 8.

4. A further contention in the bill is that "the Urban Renewal Plan submitted by the Authority was invalid and should not have been approved because [1] it did not conform to a general plan for the municipality as a whole and [2] was not sufficiently complete to indicate zoning and planning changes as required by G. L. c. 121, § 26ZZ.[9] There is no general plan for the City of Boston as a whole. The specifications in the Plan for the use of Parcel 8 violate the applicable zoning ordinances[10] of the City of Boston,

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[9] Section 26ZZ states in part, "As used in sections twenty-six YY to twenty-six BBB, inclusive, an 'urban renewal plan' shall be construed to mean a plan, as it exists from time to time, for an urban renewal project, which plan (1) *shall conform to the general plan for the municipality as a whole, and (2) shall be sufficiently complete to indicate* such land acquisition, demolition and removal of structures, redevelopment, improvements and rehabilitation as may be proposed to be carried out in the area of the urban renewal project, *zoning and planning changes, if any*, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements" (italics supplied).

[10] There are no such ordinances. The reference must be to one of the zoning statutes for the city of Boston. St. 1924, c. 488, as amended through St. 1959, c. 193. St. 1956, c. 665, as amended through St. 1964, c. 244.

but the Plan does not indicate the changes in the ordinances required."

Significantly, there is no provision in c. 121 as to how a general plan is to be formulated, by whom, upon what notice, upon what if any hearing, what it shall contain, and many other details. The plaintiffs contend that the failure of the Plan to conform to a nonexistent general plan is jurisdictional. We do not agree. We contrue that provision as requiring conformity only where there is such a general plan.

There is no allegation in case No. 6624 that the Project Plan does not conform to the Boston Center Business District Plan.[11] In cases Nos. 13,348, 13,349, and 6623 there are categorical allegations to that effect. These allegations are too vague to withstand demurrer and are argued in the plaintiffs' briefs only by way of assertion which does not call for consideration in this opinion.[12] *Lolos* v. *Berlin*, 338 Mass. 10, 13-14. *Grozier* v. *Post Publishing Co.*, 342 Mass. 97, 101. *Vappi & Co. Inc.* v. *Aetna Cas. & Sur. Co.* Mass. .[13]

The objection that the Plan was not sufficiently complete to indicate zoning and planning changes is none too clear, especially when taken in connection with statements in State Street's pleadings in cases numbered 13,349 and 6623, where it is charged in identical language that the "Plan

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[11] There is no copy of that Plan before us. We are uninformed what may have been the source of such a plan if there is one. Even if we were so disposed and felt that we were authorized to pass upon the issue, it would not be possible for us to do so.

[12] In Boston the Authority constitutes the city planning board which must find that the project plan is based upon a local survey and conforms to a comprehensive plan for the locality as a whole. St. 1960, c. 652, § 12, second paragraph. G. L. c. 121, § 26ZZ, second paragraph (as amended through St. 1960, c. 776, § 7). An exclusive remedy for any person aggrieved by such a finding is provided by St. 1960, c. 652, § 13, final paragraph.

[13] Mass. Adv. Sh. (1965) 167, 169-170.

calls for erection of a tower building on Parcel 8 which cannot be less than 360 feet in height, but the existing zoning shown by the Plan for the locus imposes a maximum limitation of 155 feet." We construe this as meaning that the Plan shows both (a) that the intention is to erect a structure of not less than 360 feet and (b) that the existing permissible maximum height is 155 feet. This contention of the plaintiffs must fail.

We also note that the supposed requirement is but one matter enumerated in § 26ZZ respecting the completeness of a plan. We are not satisfied that there was any legislative intent to render nugatory all that may have been done on a project because of any omission to comply with this one feature. It is a matter of regret that at least this much of the plan is not available to our examination on demurrer as this would facilitate a decision.

5. We next consider the requirement of approval by the Division. In the bill the plaintiffs repeatedly allege that the Project is one of urban renewal. The Project is admittedly subject to § 26ZZ. This section is in the Housing Authority Law, Part VIII, which is entitled "Urban Renewal Projects." See St. 1955, c. 654, § 4. It provides for a hearing before the city council but none before the Division. Apparently to avoid the consequence of this omission the plaintiffs make the allegation of law that the Authority submitted its project to the Division for approval under both § 26ZZ and § 26KK. The latter section provides for a hearing by the Division but not for one by the council. In the absence of an express provision we shall not adopt a construction that the project is subject to § 26KK, which is in the Housing Authority Law, Part IV, entitled "Land Assembly and Redevelopment Projects." This interpretation is decisive upon the plaintiffs' case against the Division. The plaintiffs were not deprived of any right to be told of, or to take part in, such a proceeding. No con-

stitutional right was involved. See *Hayeck* v. *Metropolitan Dist. Commn.,* 335 Mass. 372, 375, and cases cited.

6. The only prayer of the bill pertinent to declaratory relief is the fourth prayer for a decree that "the taking of the plaintiffs' property by the Authority, made on or about July 23, 1964, was illegal and a nullity." This prayer does not directly affect the bank or Hunter. Their demurrers were rightly sustained, because as to them the bill fails to state a controversy under the declaratory procedure. See *Weinstein* v. *Chief of Police of Fall River,* 344 Mass. 314, 317. On the demurrers of the other defendants it would have been better practice to overrule the demurrers and to make a negative declaration. See *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhill,* 339 Mass. 97, 101; *School Comm. of New Bedford* v. *Commissioner of Educ.,* Mass. .[14]

7. Let the entries be made: The interlocutory decrees sustaining the demurrers of the defendant New England Merchants National Bank of Boston and of the defendant Hunter are affirmed. As to the other defendants the interlocutory and final decrees are reversed and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity.

So ordered.

THE COMPANION CASES.

1. Case No. 13,348 is a petition for a writ of certiorari by State Street against the city council to quash the proceedings before it and to annul its approval of the Plan. The petitioner appealed from orders sustaining the demurrer and dismissing the petition. One ground of demurrer was in effect that the council's action was not subject to judicial review. There was no error. The council's decision was political. *Stacy* v. *Mayor of Haverhill,* 316 Mass. 759.

[14] Mass. Adv. Sh. (1965) 1029, 1030-1031.

Clark v. *City Council of Waltham*, 328 Mass. 40, 42. *Natick Trust Co.* v. *Board of Bank Incorporation*, 337 Mass. 615, 617. *City Bank & Trust Co.* v. *Board of Bank Incorporation*, 346 Mass. 29, 32. *First Church of Christ, Scientist, in Boston, Mass.* v. *Alcoholic Beverages Control Commn.*, Mass. , .[15] Also let it be noted that a petition for certiorari is addressed to the sound discretion of the court. *Loranger* v. *Martha's Vineyard Regional High Sch. Dist. Sch. Comm.*, 338 Mass. 450, 459, and cases cited.

Orders affirmed.

2. Case No. 6622 is a bill in equity by State Street, purportedly under G. L. c. 268A, § 21 (as appearing in St. 1962, c. 779, § 1), against the city council, the Authority, the bank, and Hunter. Demurrers to the bill were sustained, one common ground being, in substance, failure to state a cause of action. The plaintiff appealed from interlocutory decrees sustaining the demurrers and from a final decree dismissing the bill. The matters alleged in the bill we have considered and rejected. We also have held that the bank and Hunter were not parties interested in those matters. We express doubt whether the plaintiff has any right of action under § 21, but do not feel required to rest our decision on that ground where no error appears.

Decrees affirmed.

3. Case No. 6623 is a petition by State Street, purportedly under G. L. c. 30A, § 14 (the State Administrative Procedure Act), against the Division to obtain a review of its decision approving the Project. The respondent demurred, one ground being lack of jurisdiction of the subject matter. The petitioner appealed from an interlocutory decree sustaining the demurrer and from a final decree dismissing the petition. There was no error. The decision was not "in an adjudicatory proceeding," which, as defined

[15] Mass. Adv. Sh. (1965) 863, 864.

in c. 30A, § 1 (1), "means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." *Westland Housing Corp.* v. *Commissioner of Ins.*, 346 Mass. 556, 557.

Decrees affirmed.

4. Case No. 13,349 is a petition for a writ of certiorari by State Street against the temporary director of the Division and the Authority, seeking review of the temporary director's determination in approving the Project. The Division is not made a party but, as the temporary director does not raise the question, we shall not discuss it. The prayer of the petition as concerns the temporary director is that "the approval of said Plan by the respondent Carney may be annulled." The prayer against the Authority is for an injunction against taking the petitioner's property by eminent domain. Both respondents demurred, one ground being that no case is stated in the petition. The petitioner appealed from orders sustaining the demurrers and from an order "denying" the petition.

The proceeding in so far as it concerns the Division or its temporary director must fail for reasons already considered by us. The prayer against the Authority falls with that against the Division or its temporary director.

Orders affirmed.

S-6624
S-13,348
S-13,349
S-6622
S-6623

KIRK, J. (dissenting, with whom Spiegel, J., joins) My chief concern is the disposition made by the majority of the plaintiffs' "principal bill for declaratory relief" in so far as it relates to the Authority and to the bank. The

majority hold that the Authority is entitled, on demurrer, to a declaration that the taking of the plaintiffs' property was legal, and that, as against the bank, no case has been stated which entitles the plaintiffs to relief.

On the record before us, I am unable to agree. The allegations which are fairly stated in the majority opinion present, I submit, a case which should be tried on the merits before final disposition is made. In summary, as I read the bill, it is alleged that the Authority, recognizing that its planned Government Center Project was in jeopardy because of the bank's opposition to the taking of its building, made a deal to appease the bank whereby, if private negotiations failed, the Authority would take the plaintiffs' building, which was not within the planned Project, so that the bank could continue in business at its existing building pending the replacement of the plaintiffs' building by a tower structure to be erected by a developer selected by the bank. When completed, the first ten floors of the tower building were to be leased to the bank. The plaintiffs' property has, in fact, been taken by the Authority.

In essence the plaintiffs allege a scheme pursuant to which the Authority exercised its power of eminent domain as a device to take the plaintiffs' property for the use of the bank and not for any public agency included within the Government Center Project. The charge, it seems to me, requires a hearing on the merits rather than a disposition, based solely on a dilatory plea, which has the twofold effect of a final foreclosure of such a hearing and a binding determination of the rights of the parties. We are limited to the actual allegations of the bill. The Authority and the bank have chosen to stand on their demurrers and thereby admit those allegations. That there may be facts which justify the taking of the plaintiffs' building for the Project is beside the point. If there be such facts they are not before us in any form. There is no answer; there is no

denial. There is no fact of which judicial notice may be taken which compels a determination that the taking was legal. The Authority and the bank should be held to the consequences of their pleadings and be required to go to trial as would any other litigant.

A few additional observations are in order. The opinion states that the plaintiffs' case does not fall within the illustration given by Chief Justice Qua in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, 263. It could be said that the case in a strictly literal sense does not come within the specific illustration cited. I respectfully suggest, however, that the purpose of the taking, as here alleged, is more flagrant than anything suggested by the illustration in the *Despatchers' Cafe* case and is indistinguishable in principle. It is the taking by a public authority of land with building of private persons so that other private persons may construct, for their own use and benefit, a different building on the land taken.

I likewise suggest that the issue here presented is not, as the opinion intimates, what were "the impelling motives of officers authorized to exercise the power of eminent domain," but rather is whether the Authority was "actually exercising that power for authorized purposes." I submit that on the pleadings, a case of the nature envisioned by Chief Justice Qua is now before us in aggravated form and should be dealt with.[16]

Other grounds relied upon by the majority to support their conclusions seeem to me to be insubstantial. It is said, for example, that the acts and statements of the chief administrative officer of the Authority in connection with the taking are not attributable to the Authority. I

[16] "It will be time enough to deal with such a case when it arises." Qua, C.J., in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.* 332 Mass. 259, 263.

find it difficult to reconcile this statement with what was said in *Costonis* v. *Medford Housing Authy.*, 343 Mass. 108, 114-115. In any event, the question of the capacity of the chief administrative officer to act and speak for the Authority, if indeed it is controverted, could be and should be resolved at the trial and is not, in my judgment, either cumulatively or independently, sufficient reason for denying the plaintiffs a trial.

Similarly, the majority's statement that the position of the bank with respect to the proposed tower building is "no different legal position from that of any other prospective tenant" impresses me as unrealistic in view of the allegations that the bank stood athwart the original plan, participated in the arrangement for the taking of the plaintiffs' land, selected the developer who was to construct the new building on that land, and made an agreement for a lease of the first ten floors of the new building. If, on these allegations, the bank is not an indispensable party to the litigation, it should, in my opinion, be regarded at least as a proper and perhaps a necessary party as those terms are customarily applied. See *Minnesota* v. *Northern Sec. Co.*, 184 U. S. 199, 235-236; *Franks* v. *Markson*, 337 Mass. 278, 283.

Transcending the effect of the holding of the majority in the present case are its implications for the future. On the one hand, it is difficult to foresee how any landowner will ever have access to a forum to show that the power of eminent domain is being exercised for a private purpose by a public authority vested with that power. On the other hand, it is not difficult to conceive of situations wherein economically powerful private interests, shielded by the opinion of the majority and working behind the facade of a public authority which has the power of eminent domain, will be enabled to become the real beneficiaries of the exercise of that power in contravention of

Article X of the Declaration of Rights of the Constitution of the Commonwealth.

For the reasons stated and to the extent indicated, I dissent from the disposition of the bill for declaratory relief. I would order that the demurrers of the Authority and the bank be overruled, that they be required to answer, and that the case proceed to trial with the least practicable delay.

Appendix B

Chapter 231A

§ 1.

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

§ 2.

The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writ-

ings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination.

The foregoing enumeration shall not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

§ 3.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons. The reasons for such refusal shall be stated in the record.

§ 4.

All orders, judgments, decrees and refusals under this chapter may be reviewed as other orders, judgments and decrees.

§ 5.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

§ 6.

In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential

relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer.

§ 7.

Where a judgment or other consequential relief is sought in an action or suit, the costs shall not be affected by the making or refusal of any determination; but in a suit for a determination only, under this chapter, costs shall be as in other cases in equity.

§ 8.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

§ 9.

This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered. Nothing in this chapter shall be held to affect the jurisdiction of the land court, and the procedure established hereby shall be in addition to any other procedure for declaratory relief.

Rule 28

Demurrers, Pleas and Answers in Equity

(Applicable to equity cases)

The defendant, at any time before the bill is taken for confessed, or afterwards by leave of court, may demur, plead or answer to the bill; and he may demur to part, plead to part, and answer as to the residue.

The court may give leave *ex parte* to a defendant to file a demurrer or plea, reserving his answer. In the absence of such leave, the defendant must (a) file at the same time his demurrer, plea and answer, or such of them as he may desire, and shall have no right without leave of court to file another of such pleadings after filing any one of them, or (b) include in his answer any special matter by way of demurrer and plea, or either of them, describing such matter clearly as by way of demurrer or plea as the case may be, in which case and not otherwise he shall have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

If a plea or demurrer shall be filed, with leave to reserve the answer, and the plea or demurrer shall be overruled or disproved, no other plea or demurrer shall be received without leave of court, but the defendant shall within ten days answer the bill.

If, upon an issue on a plea, the facts pleaded be determined for the defendant, they shall avail him only as far as in law and equity they ought to avail him.

Appendix C.

August 30, 1965

Hon. Raymond S. Wilkins
Chief Justice
Supreme Judicial Court
Court House
Boston, Mass.

My dear Mr. Chief Justice:

On behalf of the plaintiffs in the case of *Moskow et al. v. Boston Redevelopment Authority et al.*, No. 6624, I hereby respectfully request a rehearing with respect to the following paragraph which appears on page 19 of the typewritten opinion of the Court:

> "7. Let the entries be made: The interlocutory decrees sustaining the demurrers of the defendant New England Merchants National Bank of Boston and of the defendant Hunter are affirmed. As to the other defendants the interlocutory and final decrees are reversed *and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity.*" (emphasis mine.)

This is a case in which the plaintiffs have never had an opportunity to introduce evidence, or to be heard as to the kind of declaratory judgment to be issued. They were deprived of that opportunity by the action of the Superior Court in sustaining demurrers which asserted that plaintiffs had no right to any kind of declaration. Their appeals from that action raised but one question: Do the plaintiffs have a right to *some kind* of declaration.

The Court's disposition of the case holds on the one hand that the plaintiffs were right, and the Superior Court wrong, and on the other hand deprives the plaintiffs of the fruits of their victory by entering a declaration against them before they have had any opportunity to introduce evidence or be heard as to the content of the declaration.

In support of this result the Court relies upon *Foley v. Springfield,* 328 Mass. 59, 62-63; *Vasilakis v. Haverhill,* 339 Mass, 97, 101, and *School Committee of New Bedford v. Commissioner of Education,* Mass. Adv. Sh. (1965) 1029, 1030-1031.

The *Foley case* was heard on a case stated. The *Vasilakis case* came to this Court on a record which included findings of fact made after a trial in the Superior Court. In each of those cases the plaintiff (as well as defendant) had an opportunity to establish the facts and to be heard thereafter in both this Court and the Superior Court as to the content of the declaration to be issued. The record in the *New Bedford case* closely resembles the present record in that it contained no case stated or finding of facts, the Superior Court there, as here, having sustained a demurrer to the petition. There, as here, this Court held that the demurrer should have been overruled, and then went on to say:

> "It may be that the bill states with substantial accuracy the relevant facts. That however, cannot be determined in advance of the filing of the defendants' answers and trial on the merits. Thus we do not afford declaratory relief finally on this record . . ." Mass. Adv. Sh. (1965) 1029, 1031—

I respectfully submit that here, as in the *New Bedford case,* no declaration should be made "in advance of the filing of defendants' answers and trial on the merits."

In order to protect the rights of plaintiffs I am bound to state further to the Court that the entry of a binding declaration on the present record deprives the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that they have never had the opportunity to establish the relevant facts by introducing evidence, nor the opportunity to be heard as to the proper declaration

to be entered after the facts are established. Upon this point I respectfully refer the Court to the opinion of Mr. Justice Holmes in *Saunders v. Shaw,* 244 U.S. 317, 320:

> "... But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 . . ."

A copy of this letter has been sent to counsel for each of the parties.

Respectfully yours,

JAMES W. KELLEHER

SUPREME JUDICIAL COURT
Boston, Massachusetts

John V. Spalding
Associate Justice

October 4, 1965

James W. Kelleher, Esquire
73 Tremont Street
Boston, Massachusetts

Dear Sir:

Your request for rehearing in case No. 6624, *Moskow* v. *Boston Redevelopment Authority,* has been considered by the full court and is denied. The opinion is to stand as originally written.

Yours very truly,
(s) JOHN V. SPALDING

cc: CLAUDE B. CROSS, *Esquire*
LEWIS H. WEINSTEIN, *Esquire*
WILLIAM H. KERR, *Esquire*
RICHARD WAIT, *Esquire*
JASON A. AISNER, *Esquire*

Appendix D.

Brief for Appellants, p. 60:

CONCLUSION

For the reasons stated, the interlocutory decrees sustaining the demurrers in all five cases should be reversed, and the final decrees should be reversed. The orders denying the motions of the petitioner or plaintiff in the first four cases to add parties and to amend should be vacated, and the Superior Court authorized to rehear those motions and conduct such further proceedings as may be proper.

Respectfully submitted,
CLAUDE B. CROSS,
JOHN M. REED,
Attorneys for Appellants.

Brief for Boston Redevelopment Authority, p. 68:

CONCLUSION

Despite a plethora of papers and words, plaintiffs have failed to make allegations entitling them to any relief in any of their various proceedings. For the reasons stated herein, this Court should affirm the orders of the Superior Court sustaining all demurrers in all five cases, the judgment of the Superior Court dismissing the petition in No. 593464, the final decree of the Superior Court dismissing with costs the bill in No. 82572 Equity, the order of the Superior Court denying the petition in No. 594464, the final decree of the Superior Court dismissing with costs the petition in No. 82705 Equity, the final decree of the Superior Court dismissing with costs the bill in No. 82973 Equity, and the orders of the Superior Court denying the motions of the petitioner or plaintiff in Nos. 593464, 82572

Equity, 594464 and 82705 Equity to add parties and to amend.

Respectfully submitted,
LEWIS H. WEINSTEIN
VERNE W. VANCE, JR.
Attorneys for Defendant and Amicus Curiae
Boston Redevelopment Authority

JOHN C. CONLEY
General Counsel
Boston Redevelopment Authority
FOLEY, HOAG & ELIOT
Of Counsel

Brief for Division of Urban and Industrial Renewal, p. 17:

CONCLUSION

For the reasons given, the demurrers of the parties on behalf of whom this brief is submitted were properly sustained. In Cases Nos. 6623 and 6624 the interlocutory and final decrees should be affirmed. In Case No. 13,349 the order for judgment should be affirmed.

Respectfully submitted,
EDWARD W. BROOKE,
Attorney General,
By DAVID BERMAN,
Assistant Attorney General.

CONCLUSION

Brief for City of Boston and City Council of Boston, p. 13:

It is thus respectfully submitted that in No. 6,624 this Court should affirm the action of the Court below in sustaining (R. 15) the demurrer of the City of Boston and its City Council and in entering (R. 23) a final decree dismissing the bill.

Respectfully submitted,
ARTHUR G. COFFEY,
Corporation Counsel,
and
WILLIAM H. KERR,
Attorneys for the City of Boston and the City Council of Boston.

Brief for New England Merchants National Bank, p. 5:

CONCLUSION

We urge that the interlocutory decrees and the final decrees in the above two cases be affirmed with costs.

Respectfully submitted,
RICHARD WAIT.

Brief for Andrew A. Hunter, p. 5:

CONCLUSION

The respondent Andrew A. Hunter is not a proper party to either proceeding as there is no relief sought against him. There is no controversy in existence between the plaintiffs and him. No cause of action at law or in equity is set forth against him. He has no legal interest in the property in question. No order may be entered in respect of him. He has no rights that may be affected by a declaration. Therefore the interlocutory and final decrees ought to be affirmed.

Respectfully submitted,
JASON A. AISNER.

Appendix E.

Brief for Petitioner in *Willcutt v. Prescott,* 340 Mass. 532, pp. 9-10:

CONCLUSION

The petitioners request this court to order that the demurrers of the respondents be overruled.

The petitioners request this court to declare that the agreement of July 7, 1934, need not be wholly made void, but that, until the trial is over, payments of 1/5 of 80% of the income shall be paid to William B. Willcutt, Emma W. Fletcher, the petitioners, and to the three children of Levi Willcutt, and that the trust be declared a specific trust without any general charitable intent and that William B. Willcutt and Emma W. Fletcher shall share with the petitioners and others equally if the trust fails.

Respectfully submitted,
ARTHUR M. BEALE,
Attorney for Petitioners.

Brief for petitioner in *Trustees of Reservations* v. *Stockbridge,* Mass. Adv. Sh. (1965) 265, at p. 15:

IV. CONCLUSION

For the reasons stated, the taking by the Town should be declared illegal and of no force or effect and the Town be restrained from entering upon the land of the Trustees or in any way interfering with the petitioner's occupation thereof.

Respectfully submitted,
HERBERT P. GLEASON.

HILL, BARLOW, GOODALE & ADAMS,
Of Counsel.